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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. OLIVIA CHRISTINA GILBERT, Defendant and Appellant.	E068495 (Super.Ct.No. FWV1600482) OPINION

APPEAL from the Superior Court of San Bernardino County. Michael R. Libutti, Judge. Affirmed.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Sabrina Y. Lane-Erwin, Deputy Attorneys General, for Plaintiff and Respondent.

FACTUAL AND PROCEDURAL HISTORY

A. PROCEDURAL HISTORY

On February 11, 2015, a felony complaint charged defendant and appellant Olivia Christina Gilbert and codefendant Tjen Hin Thjin[1] with grand theft of personal property, in violation of Penal Code[2] section 487, subdivision (a) (count 1). On June 1, 2017, defendant pled guilty to grand theft of personal properly. On the same day, the trial court placed defendant on formal probation.

On June 7, 2017, defendant filed a timely notice of appeal.

B. FACTUAL HISTORY

Over the course of six months in 2016, defendant, working with coparticipants, embezzled approximately $50,000 from her employer, Staples. This activity appeared to be part of a larger embezzlement scheme that included other Staples stores. The fraud involved the creation of hundreds of fraudulent online accounts in the names of the coparticipants. Defendant would post fictitious ink cartridge redemptions to the fraudulent accounts. The coparticipants would then use the redemption monies in the accounts to purchase new ink cartridges at Staples stores. For her role in the scheme, the coparticipants paid defendant with cash and gift cards. Defendant personally input approximately 1,555 separate transactions.

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[1] Codefendant Tjen Hin Thjin is not a party to this appeal.

[2] All further statutory references are to the Penal Code unless otherwise indicated.

DISCUSSION

Defendant contends that an electronic-search condition is unconstitutionally overbroad. We disagree.

When the court placed defendant on probation, it imposed various terms and conditions. The term required defendant to "submit to search and seizure (electronic device) by a government entity of any electronic device that you are an authorized processor of pursuant to PC 1546.1(c)(10)." Defendant objected to the term. The prosecutor asked for the search term based on the complex fraud scheme in the underlying matter and identity theft.

"If a probation condition serves to rehabilitate and protect public safety, the condition may 'impinge upon a constitutional right otherwise enjoyed by the probationer, who is "not entitled to the same degree of constitutional protection as other citizens." ' " (*People v. O'Neil* (2008) 165 Cal.App.4th 1351, 1355, quoting *People v. Lopez* (1998) 66 Cal.App.4th 615, 624.) However, " '[a] probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as constitutionally overbroad.' [Citation.] 'The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement.' " (*People v. Pirali* (2013) 217 Cal.App.4th 1341, 1346; accord, *In re Sheena K.* (2007) 40 Cal.4th 875, 890.)

In *Riley v. California* (2014) ___ U.S. ___ [134 S.Ct. 2473], the United States Supreme Court rejected the government's argument that law enforcement may, without a warrant, search a cell phone seized from an arrested individual. The court discussed the fact that a modern cell phone can hold an immense amount of confidential information, including past and current medical records, past and current financial records, Internet searches involving highly personal issues, personal diaries, photographs, and intimate correspondence. (*Id*. at pp. 2489-2491.) The court balanced the strong privacy intrusion arising from a search of this type of information against the law enforcement justifications for dispensing with the warrant requirement, and found the arrestee's privacy concerns outweighed the law enforcement justifications. (*Id*. at pp. 2485-2493.) The Supreme Court, however, made clear it was not holding that "a cell phone is immune from search" (*id*. at p. 2493), and recognized its ruling would not necessarily extend to other situations in which law enforcement needs are stronger. (*Id*. at pp. 2493-2494.)

Relying on *Riley*, the Court of Appeal in *People v. Appleton* (2016) 245 Cal.App.4th 717 concluded an electronics-search probation condition was constitutionally overbroad because it would allow the search of "vast amounts of personal information unrelated to defendant's criminal conduct or his potential for future criminality" (*id*. at p. 727), and remanded for the trial court to fashion a more narrowly tailored electronics-search condition (*id*. at pp. 724-727; accord, *In re P.O.* (246 Cal.App.4th 268, 297-298).

In two recent decisions, the Fourth District Court of Appeal, Division One, found *Appleton*'s analysis unpersuasive. (*People v. Trujillo* (2017) 15 Cal.App.5th 574, 587-

589, rev. granted Nov. 29, 2017, S244650; *People v. Nachbar* (2016) 3 Cal.App.5th 1122, 1128-1130, rev. granted Dec. 14, 2016, S238210.) In *Trujillo*, the court explained that, although *Riley*'s description of the general privacy concerns pertaining to cell phones went into their decision making, *Riley*'s ultimate conclusion regarding the need for a warrant did not necessarily apply in the probation condition context without specific facts showing a heightened privacy interest. (*Trujillo*, at pp. 587-589; *Nachbar*, at p. 1129; accord *In re J.E.* (2016) 1 Cal.App.5th 795, 803-807, rev. granted Oct. 12, 2016, S236628.) The appellate court emphasized a probationer's reduced privacy rights (as compared to an arrestee's rights); the existence of facts showing the need for intensive supervision; the absence of any evidence showing the probationer's electronics contained the type of sensitive information identified in *Riley*; and the fact that neither defendant established the electronic searches would be materially different from a search of their homes and/or challenged the Fourth Amendment waiver as to their residences. (*Trujillo*, at pp. 586-589; *Nachbar*, at pp. 1128-1129.) While *Nachbar* and *Trujillo* remain pending before the California Supreme Court, we continue to find their reasoning persuasive, absent a contrary direction from the high court. (See Cal. Rules of Court, rule 8.1115(e).)

The record in this case does not contain the necessary particularized information supporting the need for a more narrowly tailored Fourth Amendment waiver condition. Here, defendant was convicted of perpetrating a $50,000 embezzlement. She personally used her employer's computer system to input 1,555 fraudulent transactions. She maintained electronic correspondence with her coparticipants to plan and communicate about the months-long embezzlement scheme. Moreover, although there is no probation

report for this case, the prosecutor referenced an identity theft case that defendant was also involved in, and added that this conviction was not defendant's "first time around the block."

Because of the nature of her crime, defendant concedes that the electronic search term is not an abuse of discretion. She, however, asserts that the condition should be narrower. She suggested that the condition could be limited "to a specified list of social media websites, email accounts, or applications." Notwithstanding defendant's argument, the evidence here showed that defendant was texting with her coparticipants over the course of many months. She was not using a social media site or an email account. Moreover, using her cash register at work, defendant accessed one or more databases to input the transactions. She and her coparticipants were successful in their fraudulent efforts because they succeeded in taking $50,000, and avoided detection for several months. If the probation officer is to have any success in facilitating defendant's rehabilitation, an electronics search condition is imperative. Limitations would only flag for defendant which sites or email accounts she would need to avoid to avoid detection of any criminal activity.

Moreover, there are no facts showing that defendant uses her electronic devices to hold the type of sensitive medical, financial, or personal information described in *Riley* and *Appleton*. In the proceedings below, defendant failed to identify any particular category of private information contained on her electronic devices or devices she uses that should be off-limits to a probation officer. Additionally, there are no facts in the record showing a search of defendant's electronics would be any more invasive than an

unannounced, without-cause, warrantless search of her residence, a highly-intrusive condition she has not challenged on appeal. As in *Trujillo*, there is nothing in the record showing there would be any particular information on defendant's electronic devices that require protection from the government because it is more private than items in her residence. Furthermore, any concerns regarding the potential invasiveness of the electronics-search condition in this case would be ameliorated by the restriction against arbitrary, capricious, or harassing probation searches. (See *People v. Woods* (1999) 21 Cal.4th 668, 682; *People v. Cervantes* (2002) 103 Cal.App.4th 1404, 1408.)

Based on the above, we find that the electronic search condition is constitutional.

DISPOSITION

The judgment is affirmed.

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MILLER
J.

We concur:

RAMIREZ
P. J.

SLOUGH
J.